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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE THOMAS J. WHELAN)

11

12 UNITED STATES OF AMERICA,) **CASE NO. 08CR1552-W**
13 Plaintiff,)
14) DATE: June 30, 2008
v.) TIME: 2:00 p.m.
15)
16 MARK ANTHONY GALLEGOS,) **NOTICE OF MOTIONS AND**
17 Defendant.) **MOTIONS:**
18 _____)
) (1) **TO SUPPRESS IDENTIFICATION;**
) (2) **TO COMPEL DISCOVERY; AND**
) (3) **FOR LEAVE TO FILE**
) **FURTHER MOTIONS**

20 TO: KAREN P. HEWITT, UNITED STATES ATTORNEY; AND
DAVID LESHNER, ASSISTANT UNITED STATES ATTORNEY:

21 PLEASE TAKE NOTICE that on June 30, 2008, at 2:00 p.m., or as soon thereafter as
22 counsel may be heard, the defendant, Mark Anthony Gallegos, by and through his counsel, Gregory
23 T. Murphy and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting
24 the following motions.

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MOTIONS

2 The defendant, Mark Anthony Gallegos, by and through his attorneys, Gregory Murphy and
3 Federal Defenders of San Diego, Inc., pursuant to the United States Constitution, the Federal Rules
4 of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this
5 Court for an order:

- 1) Suppressing Identification;
 - 2) Compelling discovery; and
 - 3) for leave to file further motions.

9 These motions are based upon the instant motions and notice of motions, the attached
10 statement of facts and memorandum of points and authorities, and all other materials that may come
11 to this Court's attention at the time of the hearing on these motions.

Respectfully submitted,

15 | Dated: June 16, 2008

/s/ Gregory Murphy
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Federal Defenders of San Diego, Inc.
Attorneys for Mr. Mark Anthony Gallegos
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE THOMAS J. WHELAN)

11

12 UNITED STATES OF AMERICA,

) CASE NO. 08CR1552-W

13 Plaintiff,

)) STATEMENT OF FACTS AND
)) MEMORANDUM OF POINTS AND
)) AUTHORITIES IN SUPPORT OF
)) DEFENDANT'S MOTIONS

14 | v.

15 | MARK ANTHONY GALLEGOS

DEFENDANT'S MOTIONS

16 || Defendant

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L.

STATEMENT OF FACTS

20 A. The Charge

21 The government alleges that Mark Anthony Gallegos violated 8 U.S.C. § 1324 by (1) using
22 his grandfather's shed to harbor an undocumented immigrant named Ismael Ayon and (2) aiding and
23 abetting others in bringing Mr. Ayon to the United States. Mr. Gallegos has pleaded not guilty to
24 both charges.

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1 **B. The Identification**

2 After arresting Mr. Gallegos and Mr. Ayon, ICE agents brought both men to the same facility
 3 for processing. Mr. Gallegos and Mr. Ayon were clearly visible to each other while they were being
 4 processed. Indeed, they briefly shared the same cell.

5 The agents interviewed Mr. Ayon at least once before video-recording his statement. During
 6 that earlier interview, they showed Mr. Ayon a photo of Mr. Gallegos. See Exhibit A, Transcript of
 7 Videotaped Interview at 4:11-12 (Q: "Who opened the door?" A: "The dude of the photo you
 8 showed me."). Then, after eliciting this identification, the agents video-recorded another interview
 9 of Mr. Ayon. This time, they showed Mr. Ayon a "six pack" of photos. See Exhibit A, pp. 5:21-
 10 6:20. Unsurprisingly, Mr. Ayon selected from that six-pack the photo of Mr. Gallegos he had seen
 11 earlier.

12 **II.**

13 **MOTION TO SUPPRESS IDENTIFICATION**

14 **A. The Pretrial Identification Was Unnecessarily Suggestive**

15 Pretrial identification procedures must be fairly conducted to avoid the likelihood of
 16 misidentification caused by unnecessarily suggestive methods. Simmons v. United States, 390 U.S.
 17 377, 384 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967); United States v. Sanders, 479 F.2d
 18 1193, 1198 (D.C. Cir. 1973). In determining the admissibility of a pretrial identification, the Court
 19 must consider the "totality of the circumstances" to determine whether an unnecessarily suggestive
 20 identification procedure gives rise to a substantial likelihood of misidentification. Neil v. Biggers,
 21 409 U.S. 188, 199 (1972); Simmons, 390 U.S. at 382.

22 In making this determination, the Court should consider the size of the array, the manner of
 23 presentation by the officers, and the contents of the array. United States v. Thai, 29 F.3d 785, 808
 24 (2d Cir. 1994). Additionally, the actions and remarks of the government agents involved in the
 25 procedures may cause an otherwise fair pretrial identification procedure to be impermissibly
 26 suggestive. See United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980); United States v. Jarvis,
 27 560 F.2d 494, 500 (2d Cir. 1977).

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1 Single-photo identification procedures have long been recognized as inherently suggestive.
2 See Stovall, 388 U.S. at 302 ("The practice of showing suspects singly to persons for the purpose
3 of identification, and not as part of a lineup, has been widely condemned."); Mysholowsky v. People
4 of New York, 535 F.2d 194, 197 (2d Cir. 1976) ("We have consistently condemned the exhibition
5 of a single photograph as a suggestive practice, and, where no extenuating circumstances justify the
6 procedure, as an unnecessarily suggestive one."); Hudson v. Blackburn, 601 F.2d 785, 788 (5th Cir.
7 1979) (recognizing that "single photograph display is one of the most suggestive methods of
8 identification and is always to be viewed with suspicion"). Courts have approved of such inherently
9 suggestive identification procedures only where the procedure is necessitated by some exigent
10 circumstances. Compare Stovall, 388 U.S. at 301-02 (holding one person show-up in hospital room
11 of critically wounded victim did not violate due process where record revealed procedure was
12 "imperative"), with Manson v. Brathwaite, 432 U.S. 98, 108-109 (1977) (accepting government's
13 concession that procedure was unnecessarily suggestive where "[t]here was no emergency and little
14 urgency"), and United States v. Montgomery, 150 F.3d 983, 992-93 (9th Cir. 1998) (finding single
15 photograph procedure unnecessarily suggestive where government failed to establish need for it).

16 There was no urgency here. Mr. Ayon was in custody and subject to detention pending
17 prosecution for illegal entry. Thus, "[n]o urgent need for immediate action prevented (the
18 investigating officer) from taking the small trouble to bring several similar photos with him."
19 United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971) (internal quotations omitted).

20 Moreover, the uncontradicted evidence before the Court establishes that the identification
21 procedures were unduly suggestive. By displaying Mr. Gallegos to Mr. Ayon throughout his
22 booking, then placing them in the same cell, the agents unfairly and unnecessarily focused attention
23 on Mr. Gallegos as the agents' chosen suspect. Worse, the agents employed a single-photograph
24 procedure when there was no exigency justifying the use of such an inherently suggestive technique,
25 then videotaped themselves using a multiple photo lineup. The Court should not sanction such
26 deceptive conduct.

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1 **B. Mr. Ayon's Identification Was Not Otherwise Reliable**

2 Identifications made under unduly suggestive circumstances are inadmissible unless the
3 government is able to show that the identification was nonetheless reliable. See United States v.
4 Gregory, 891 F.2d 732, 734 (9th Cir. 1989). To determine the corrupting effect of the faulty
5 identification procedure herein, this Court must determine (1) the reliability of the pretrial
6 identification and (2) the reliability of any in-court identification.

7 The Supreme Court set forth five factors to help evaluate the reliability of an out-of-court
8 identification procedure: (1) the opportunity of the witness to view the criminal at the time of the
9 crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the
10 criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the
11 length of time between the crime and the confrontation. Biggers, 409 U.S. at 199-200.

12 These factors militate against a finding of reliability of the identifications in this case.

13 First, Mr. Ayon's interactions with Mr. Gallegos lasted less than a minute at most. Second, Mr.
14 Ayon indicates he was hurrying to conceal himself, and therefore not necessarily interested in the
15 identity of the person from whom he was allegedly receiving instructions. Discovery suggests Mr.
16 Ayon had never seen Mr. Gallegos before. Accordingly, the second factor also weighs against
17 admitting the identification. Third, there is no indication that Mr. Ayon provided any description of
18 Mr. Gallegos during the interviews that preceded the recording. Fourth, any confidence Mr. Ayon
19 displayed in his choice of photos from the six-pack resulted from the suggestiveness of the procedure
20 itself. See Raheem v. Kelly, 257 F.3d 122, 139 (2d Cir. 2001)(finding certainty engendered by
21 suggestiveness). Fifth and finally, under these profoundly suggestive circumstances, the length of
22 time between the alleged offense and the identification is simply irrelevant.

23 "Suggestive pretrial photographic identification procedures may taint in-court identifications
24 sufficient to deny the accused due process of law." Field, 625 F.2d at 865. Before allowing an
25 in-court identification following an impermissibly suggestive out-of-court procedure, this Court must
26 determine whether the witness had an independent source to support the in-court identification.
27 United States v. Wade, 388 U.S. 218, 240 (1967). It appears that no such independent source exists
28 herein. If the government is unable to prove the existence of any reliable independent source

1 necessary to support an in-court identification of Mr. Gallegos, the government should be precluded
2 from seeking the testimony of Mr. Ayon as to whether he recognizes Mr. Gallegos.

III.

MOTION COMPEL DISCOVERY

5 Mr. Gallegos requests the following discovery. His request is not limited to those items of
6 which the prosecutor is aware. It includes all discovery listed below that is in the custody, control,
7 care, or knowledge of any “closely related investigative [or other] agencies.” See United States v.
8 Bryan, 868 F.2d 1032 (9th Cir. 1989).

9 1. The Defendant's Statements. The government must disclose to Mr. Gallegos *all*
10 copies of any written or recorded statements made by Mr. Gallegos; the substance of any statements
11 made by Mr. Gallegos that the government intends to offer in evidence at trial; any response by
12 Mr. Gallegos to interrogation; the substance of any oral statements that the government intends to
13 introduce at trial and any written summaries of Mr. Gallegos's oral statements contained in the
14 handwritten notes of the government agent; any response to any Miranda warnings that may have
15 been given to Mr. Gallegos; and any other statements by Mr. Gallegos. Fed. R. Crim. P. 16(a)(1)(A)
16 and (B). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the
17 government must reveal *all* Mr. Gallegos's statements, whether oral or written, regardless of whether
18 the government intends to make any use of those statements.

19 2. Arrest Reports, Notes and Dispatch Tapes. Mr. Gallegos also specifically requests
20 that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances
21 surrounding his arrest or any questioning, if such reports have not already been produced *in their*
22 *entirety*, be turned over to him. This request includes, but is not limited to, any rough notes, records,
23 reports, transcripts or other documents in which statements of Mr. Gallegos or any other discoverable
24 material is contained. Mr. Gallegos includes in this request any redacted portions of the Report of
25 Investigation (“ROI”) and any subsequent ROIs that the case agent or any other agent has written.
26 This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and (B) and Brady v. Maryland, 373 U.S.
27 83 (1963). See also Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports,
28 investigator’s notes, memos from arresting officers, dispatch tapes, sworn statements, and

1 prosecution reports pertaining to Mr. Gallegos are available under Fed. R. Crim. P. 16(a)(1)(A) and
2 (B), Fed. R. Crim. P. 26.2 and 12(I). Preservation of rough notes is requested, whether or not the
3 government deems them discoverable.

4 3. Brady Material. Mr. Gallegos requests all documents, statements, agents' reports, and
5 tangible evidence favorable to him on the issue of guilt and/or that affects the credibility of the
6 government's case. Impeachment and exculpatory evidence both fall within Brady's definition of
7 evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v.
8 Agurs, 427 U.S. 97 (1976).

9 4. Any Information That May Result in a Lower Sentence. As discussed above, any
10 information that may result in a more favorable sentence must also be disclosed pursuant to Brady,
11 373 U.S. 83. The government must disclose any cooperation or attempted cooperation by Mr.
12 Gallegos, as well as any information that could affect any base offense level or specific offense
13 characteristic under Chapter Two of the United States Sentencing Commission Guidelines Manual
14 ("Guidelines"). Also included in this request is any information relevant to a Chapter Three
15 adjustment, a determination of Mr. Gallegos's criminal history, or any other application of the
16 Guidelines.

17 5. The Defendant's Prior Record. Evidence of a prior record is available under Fed. R.
18 Crim. P. 16(a)(1)(D). Mr. Gallegos specifically requests a complete copy of any criminal record.

19 6. Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under
20 Fed. R. Crim. P. 16(a)(1)(D) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid.
21 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance
22 of trial . . . of the general nature . . ." of any evidence the government proposes to introduce under
23 Fed. R. Evid. 404(b) at trial. Sufficient notice requires the government to "articulate *precisely* the
24 evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence."
25 United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (emphasis added; internal citations
26 omitted); see also United States v. Brooke, 4 F.3d 1480, 1483 (9th Cir. 1993) (reaffirming
27 Mehrmanesh and reversing convictions).

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1 This includes any “TECS” records (records of prior border crossings) that the government
2 intends to introduce at trial, whether in its case-in-chief, impeachment, or rebuttal. Although there
3 is nothing intrinsically improper about prior border crossings, they are nonetheless subject to 404(b),
4 as they are “other acts” evidence that the government must produce before trial. United States v.
5 Vega, 188 F.3d 1150, 1154-1155 (9th Cir. 1999). Mr. Gallegos requests that such notice be given
6 three weeks before trial to give the defense time to adequately investigate and prepare for trial.

7 7. Evidence Seized. Evidence seized as a result of any search, either warrantless or with
8 a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(E).

9 8. Request for Preservation of Evidence. The defense specifically requests that all
10 dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the
11 possession, custody, or care of the government and that relate to the arrest or the events leading to
12 the arrest in this case be preserved. This request includes, but is not limited to, Mr. Gallegos’s
13 personal effects and any evidence seized from Mr. Gallegos or any third party. This request also
14 includes any material or percipient witnesses who might be deported or otherwise likely to become
15 unavailable (e.g. undocumented aliens and transients). Mr. Gallegos requests that the prosecutor be
16 ordered to question all the agencies and individuals involved in the prosecution and investigation of
17 this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve
18 any such evidence.

19 9. Henthorn Material. Mr. Gallegos requests that the Assistant United States Attorney
20 (“AUSA”) assigned to this case oversee (not personally conduct) a review of all personnel files of
21 each agent involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S.
22 437, 438 (1995) (holding that “the individual prosecutor has a duty to learn of any favorable
23 evidence known to the others acting on the government’s behalf in the case, including the police”);
24 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to,
25 any complaints filed (by a member of the public, by another agent, or any other person) against the
26 agent, whether or not the investigating authority has taken any action, as well as any matter for which
27 a disciplinary review was undertaken, whether or not any disciplinary action was ultimately
28 recommended. Mr. Gallegos further requests production of any such information at least one week

1 prior to the motion hearing and two weeks prior to trial. If the prosecutor is uncertain whether
2 certain information should be disclosed pursuant to this request, this information should be produced
3 to the Court in advance of the motion hearing and the trial for an in camera inspection.

4 10. Tangible Objects. Mr. Gallegos requests the opportunity to inspect, copy, and test,
5 as necessary, all other documents and tangible objects, including photographs, books, papers,
6 documents, alleged narcotics, fingerprint analyses, vehicles, or copies of portions thereof, that are
7 material to the defense or intended for use in the government's case-in-chief or were obtained from
8 or belong to Mr. Gallegos. Fed. R. Crim. P. 16(a)(1)(E). Specifically, Mr. Gallegos requests color
9 copies of all photographs in the government's possession of the alleged narcotics and the vehicle in
10 which the narcotics were found.

11 11. Expert Witnesses. Mr. Gallegos requests the name, qualifications, and a written
12 summary of the testimony of any person that the government intends to call as an expert witness
13 during its case in chief. Fed. R. Crim. P. 16(a)(1)(G). This summary should include a description
14 of the witness' opinion(s), as well as the bases and the reasons for the opinion(s). See United States
15 v. Duvall, 272 F.3d 825 (7th Cir. 2001) (finding that government's written expert notice did not
16 adequately summarize or describe police detective's testimony in drug prosecution where notice
17 provided only a list of the general subject matters to be covered and failed to identify what opinion
18 the expert would offer on those subjects). This request includes, but is not limited to, disclosure of
19 the qualifications of any government witness who will testify that he understands and/or speaks
20 Spanish or any other foreign language that may have been used during the course of an interview
21 with Ms. Gallegos or any other witness. Mr. Gallegos requests the notice of expert testimony be
22 provided at a minimum of three weeks prior to trial so that the defense can properly prepare to
23 address and respond to this testimony, including obtaining its own expert and/or investigating the
24 opinions, credentials of the government's expert and obtain a hearing in advance of trial to determine
25 the admissibility of qualifications of any expert. See Kumho v. Carmichael Tire Co., 526 U.S. 137,
26 119 S.Ct. 1167, 1176 (1999) (trial judge is "gatekeeper" and must determine, reliability and
27 relevancy of expert testimony and such determinations may require "special briefing or other
28 proceedings")

1 12. Impeachment evidence. Mr. Gallegos requests any evidence that any prospective
2 government witness has engaged in any criminal act whether or not resulting in a conviction and
3 whether any witness has made a statement favorable to Mr. Gallegos. See Fed. R. Evid. 608, 609
4 and 613. Such evidence is discoverable under Brady, 373 U.S. 83. See United States v. Strifler, 851
5 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir.
6 1965) (evidence that detracts from a witness' credibility).

7 13. Evidence of Criminal Investigation of Any Government Witness. Mr. Gallegos
8 requests any evidence that any prospective witness is under investigation by federal, state or local
9 authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

10 14. Evidence of Bias or Motive to Lie. Mr. Gallegos requests evidence that any
11 prospective government witness is biased or prejudiced against Mr. Gallegos, or has a motive to
12 falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Strifler, 851 F.2d
13 1197.

14 15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity.
15 Ms. Flores requests any evidence, including any medical or psychiatric report or evaluation, tending
16 to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth
17 is impaired; and any evidence that a witness has ever used narcotics or other controlled substance,
18 or has ever been an alcoholic. Strifler, 851 F.2d 1197; Chavis v. North Carolina, 637 F.2d 213, 224
19 (4th Cir. 1980).

20 16. Witness Addresses. Mr. Gallegos requests the name and last known address of each
21 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United
22 States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel
23 is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right
24 to talk to witnesses). Mr. Gallegos also requests the name and last known address of every witness
25 to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will
26 *not* be called as a government witness. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

27 17. Names of Witnesses Favorable to the Defendant. Mr. Gallegos requests the name of
28 any witness who made any arguably favorable statement concerning Mr. Gallegos or who could not

1 identify him or who was unsure of his identity or participation in the crime charged. Jackson v.
2 Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis, 637 F.2d at 223; Jones v. Jago, 575 F.2d
3 1164, 1168 (6th Cir. 1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S.
4 1086 (1980).

5 18. Statements Relevant to the Defense. Mr. Gallegos requests disclosure of any
6 statement that may be “relevant to any possible defense or contention” that he might assert. United
7 States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This includes grand jury transcripts that are
8 relevant to the defense motion to dismiss the indictment.

9 19. Jencks Act Material. Mr. Gallegos requests production in advance of the motion
10 hearing or trial of all material, including dispatch tapes, that the government must produce pursuant
11 to the Jencks Act, 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2. A verbal acknowledgment that
12 “rough” notes constitute an accurate account of the witness’ interview is sufficient for the report or
13 notes to qualify as a statement under section 3500(e)(1). Campbell v. United States, 373 U.S. 487,
14 490-92 (1963); see also United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that
15 interview notes constitutes Jencks material when an agent reviews notes with the subject of the
16 interview); see also United States v. Riley, 189 F.3d 802, 806-808 (9th Cir. 1999). Advance
17 production will avoid the possibility of delay of the motion hearing or trial to allow Mr. Gallegos
18 to investigate the Jencks material. Mr. Gallegos requests pre-trial disclosure of such statements to
19 avoid unnecessary recesses and delays and to allow defense counsel to prepare for, and use properly
20 any Jencks statements during cross-examination. Moreover, production of the rough notes is
21 particularly important in light of the interviews of Mr. Ayon that preceded the video-recording.

22 20. Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972),
23 Mr. Gallegos requests all statements and/or promises, expressed or implied, made to any government
24 witnesses, in exchange for their testimony in this case, and all other information that could arguably
25 be used for the impeachment of any government witnesses. In particular, Mr. Gallegos requests all
26 conversations between agents and Mr. Ayon regarding the possibility that he would be prosecuted.

27 21. Agreements Between the Government and Witnesses. Mr. Gallegos requests
28 discovery regarding any express or implicit promise, understanding, offer of immunity, of past,

1 present, or future compensation, or any other kind of agreement or understanding, including any
2 implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between
3 any prospective government witness and the government (federal, state and/or local). This request
4 also includes any discussion with a potential witness about or advice concerning any immigration
5 benefits, any contemplated prosecution, or any possible plea bargain, even if no bargain was made
6 or the advice not followed.

7 22. Informants and Cooperating Witnesses. Mr. Gallegos requests disclosure of the
8 names and addresses of all informants or cooperating witnesses used or to be used in this case, and
9 in particular, disclosure of any informant who was a percipient witness in this case or otherwise
10 participated in the crime charged against Mr. Gallegos. The government must disclose the
11 informant's identity and location, as well as disclose the existence of any other percipient witness
12 unknown or unknowable to the defense. Roviaro v. United States, 353 U.S. 52, 61-62 (1957). The
13 government must disclose any information derived from informants that exculpates or tends to
14 exculpate Mr. Gallegos.

15 23. Bias by Informants or Cooperating Witnesses. Mr. Gallegos requests disclosure of
16 any information indicating bias on the part of any informant or cooperating witness. Giglio, 405
17 U.S.

18 24. Such information would include what, if any, inducements, favors, payments or
19 threats were made to the witness to secure cooperation with the authorities. Again, any suggestion
20 that Mr. Ayon was subject to prosecution must be produced under Giglio.

21 25. Personnel Records of Government Officers Involved in the Arrest. Mr. Gallegos
22 requests all citizen complaints and other related internal affairs documents involving any of the
23 immigration officers or other law enforcement officers who were involved in the investigation, arrest
24 and interrogation of Mr. Gallegos. See Pitchess v. Superior Court, 11 Cal. 3d 531, 539 (1974).
25 Because of the sensitive nature of these documents, defense counsel will be unable to procure them
26 from any other source.

27 26. Performance Goals and Policy Awards. Mr. Gallegos requests disclosure of
28 information regarding standards used for measuring, compensating or reprimanding the conduct of

1 all law enforcement officers involved in the case (Customs, Border Patrol, INS, etc.) to the extent
2 such information relates to the detection of contraband. This request specifically includes
3 information concerning performance goals, policy awards, and the standards used by Customs for
4 commending, demoting, or promoting agents for their performance detecting alien smuggling.

5 27. Reports of Scientific Tests or Examinations. Pursuant to Fed. R. Crim. P. 16(a)(1)(F),
6 Mr. Gallegos requests the reports of all tests and examinations conducted upon the evidence in this
7 case, including, but not limited to, any fingerprint testing done upon any evidence seized in this case,
8 that is within the possession, custody, or control of the government, the existence of which is known,
9 or by the exercise of due diligence may become known, to the attorney for the government, and that
10 are material to the preparation of the defense or are intended for use by the government as evidence
11 in chief at the trial.

12 28. Brady Information. The defendant requests all documents, statements, agents'
13 reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects
14 the credibility of the government's case. Under Brady v. Maryland, 373 U.S. 83 (1963),
15 impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the
16 accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

17 29. Any Proposed 404(b) Evidence. The government must produce evidence of prior
18 similar acts under Fed. R. Crim. P. 16(a)(1) and Fed. R. Evid. 404(b) and any prior convictions
19 which would be used to impeach as noted in Fed. R. Crim. P. 609. In addition, under Fed. R. Evid.
20 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance
21 of trial . . . of the general nature" of any evidence the government proposes to introduce under Fed.
22 R. Evid. 404(b) at trial. The defendant requests notice two weeks before trial to give the defense
23 time to investigate and prepare for trial.

24 30. Residual Request. The defendant intends by this discovery motion to invoke his
25 rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and
26 the Constitution and laws of the United States.

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1 IV.

2 **MOTION FOR LEAVE TO FILE FURTHER MOTIONS**

3 As new information surfaces – via discovery provided by government, defense investigation,
4 or an order of this court – the defense may need to file further motions or to supplement existing
5 motions. Accordingly, Mr. Gallegos requests leave to file further motions at a later date.

6 V.

7 **CONCLUSION**

8 For the reasons stated, Mr. Gallegos requests this Court grant his motions.

9 Respectfully submitted,

10 _____
/s/ Gregory Murphy

11 Dated: June 16, 2008

12 GREGORY MURPHY
13 Federal Defenders of San Diego, Inc.
14 Attorneys for Mr. Gallegos
15 gregory_murphy@fd.org

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE THOMAS J. WHELAN)

UNITED STATES OF AMERICA,) Case No. 08CR1552-W
Plaintiff,)
v.)
MARK ANTHONY GALLEGOS,)
Defendant.)
)
CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon:

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Respectfully submitted,

DATED: June 16, 2008

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